United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

582

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22734

~~ELLI L. JOHNSON~~

~~Appellant~~

v.

UNITED STATES OF AMERICA

Appellee

v

Ellis Johnson

APPELLANT

Appeal from the United States District Court
for the District of Columbia

Raymond L. Poston, Jr.
Attorney for Appellant
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Washington, D. C. 20036

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ISSUE PRESENTED FOR REVIEW

Did the court below properly deny appellant's motion for severance under Rule 14 of the Federal Rules of Criminal Procedure?

This case was not previously before this Court.

REFERENCE TO RULINGS

Trial counsel made an informal motion for severance under Rule 14 of the Federal Rules of Criminal Procedure. (Tr. 13).*/

STATEMENT OF THE CASE

The appellant, Ellis Johnson, petitions this court to review and set aside a conviction in the United States District Court for the District of Columbia on counts of burglary, 22 D.C. Code 1801(b), and petit larceny, 22 D.C. Code 2202. The court below entered the conviction in a jury trial.

STATEMENT OF FACTS

Ellis Johnson appeals from his November 1, 1968 conviction for burglary and petit larceny. He and one Charles Burke were tried jointly on charges arising from their April 25, 1968 early morning arrest on the premises of Sure-Fit Seat Cover Center 1601 14th Street, N. W. The arresting officers testified that they found stereo tapes in the pockets of both defendants. (Tr. 84).

*/ "Tr." refers to pages of the transcript of the proceedings before the Honorable William B. Bryant, a United States District Court Judge, and a jury on October 31, 1968 and November 1, 1968.

Evidence was introduced showing the tapes to be of the type sold by Sure-fit. (Tr. 52). Both men were represented by appointed counsel.

At trial codefendant Burke admitted their presence in the Sure-fit basement. (Tr. 122-23). He further testified that the arrests took place at a time of near riot, similar to the conditions which had prevailed in Washington three weeks earlier. He detailed facts concerning a broken window in the store, free movement in and out of store by a number of people, and incidents of looting. (Tr. 104-06). He offered no corroboration of his testimony. Appellant did not testify, although originally he had indicated that he would. (Tr. 26).

When counsel for codefendant indicated on voir dire that his client would employ a riot defense, counsel for appellant objected and requested a severance. (Tr. 18). The government objected on the basis of the extra court time required for separate trials and the inconvenience which it would cause complaining witness. (Tr. 19-20, 29). Despite counsel's willingness to stipulate to complaining witness' testimony at the second trial and the court's recognition of the self-defeating nature of the riot theory of defense, severance was denied. (Tr. 19, 30). The court noted potential prejudice to appellant. (Tr. 20).

Trial commenced and codefendant's counsel assumed an active role in cross-examination and presentation of the riot defense. Counsel for appellant remained silent, speaking only to move for acquittal at the close of the government's case and to make a brief closing argument. (Tr. 94, 135-36). Appellant, on the advice of counsel, did not take the stand, and counsel did not cross-examine at any time. (Tr. 95).

Having heard the government's evidence and codefendant's riot defense, the jury returned a verdict of guilty on both counts for both defendants. (Tr. 166-67). On January 24, 1969, appellant was sentenced to a term of one to five years. (See Judgment and Commitment in Transcript of Pleadings.)

STATUTES INVOLVED

Rule 8(b) of the Federal Rules of Criminal Procedure.

Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure.

Relief from Prejudicial Error. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by joinder for trial together, the court may order an election or separate trial of counts or grant a severance of defendants or provide whatever other relief justice requires.

ARGUMENT

APPELLANT'S MOTION FOR SEVERANCE UNDER RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD HAVE BEEN GRANTED

Rule 8(b) of the Federal Rules of Criminal Procedure provides that defendants alleged to have participated in the same act constituting an offense may be charged in the same indictment. Rule 14 provides, however, that where it appears that a defendant will be prejudiced by a joint trial, separate trials may be ordered. The power to grant severance is discretionary, but the duty to sever continues throughout the trial. Schaffer v. U.S., 362 U.S. 511 (1962); Roth v. U.S., 339 F.2d 263 (10th Cir. 1964).

A. THE RISK OF DENIAL OF APPELLANT'S FIFTH AMENDMENT RIGHT TO ABSOLUTE SILENCE COULD NOT BE OVERCOME BY INSTRUCTIONS TO THE JURY

On voir dire in the instant case, counsel for codefendant

Burke indicated that Burke's defense would rest on an allegation of near-riot conditions at the time of arrest. Appellant's counsel objected to this line of defense and requested separate trials. The judge indicated that he regarded the riot theory as a self-defeating one and as tantamount to a confession of guilt. (Tr. 30). Despite his fear that allowing Burke's defense might place Johnson in jeopardy, the judge permitted the joint trial to proceed. (Tr. 20).

At trial the feared prejudice materialized. Codefendant presented his riot defense. He took the stand and on cross-examination by the government confessed that he and appellant had entered the store together. Counsel for appellant declined cross-examination and advised appellant to remain silent. Appellant offered no defense.

Mindful of appellant's passive role, as compared with codefendant's active defense, the judge instructed the jury on appellant's absolute right to remain silent. He further admonished the jurors that they must draw no inference of guilt from silence.

In the recent case of Bruton v. U.S., 391 U.S. 123 (1968), the Supreme Court granted Bruton a new and separate trial where the lower court had admitted a codefendant's extra-judicial

confession implicating Bruton. The Court found that codefendant's refusal to take the stand denied Bruton the right to confront his accuser through cross-examination.

Although the trial judge had carefully instructed the jury that the confession could not be considered in evidence against Bruton, the Supreme Court held that even such careful instruction could not sufficiently guarantee that the jury would not consider it when weighing Bruton's guilt. The Court's concern with the substantial risk of juror confusion pervades its opinion. The decision quotes from Mr. Justice Jackson's classic concurring opinion in Krulewitch v. U.S., 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction." Bruton, supra at 129. Bruton recognizes that joint trials are particularly susceptible to confusion. (See the Court's extensive citation of Chief Justice Traynor of the California Supreme Court writing in Peo. v. Aranda, 63 Cal.2d 511, 528-29, 407 P.2d 265, 271-72 (1965).)

The instant case is not squarely within the Bruton holding, for in this case codefendant's confession in open court was

admissible as to both defendants. But in this case, as in Bruton, there was substantial risk of juror confusion. The strategies employed by defendants presented a dramatic contrast. Although the judge cautioned the jury that appellant's silence could not be construed against him, that silence spoke loudly in the face of co-defendant's active attempts to set forth the truth. In such a circumstance there was a substantial risk that the jury did not follow its instructions and that it did consider appellant's silence as evidence of guilt. Such consideration would be violative of appellant's Fifth Amendment rights. Under the Bruton rationale this risk constitutes prejudice and necessitates a severance under Rule 14 of the Federal Rules of Criminal Procedure.

B. THE FORCED CHOICE BETWEEN LEAVING CODEFENDANT'S IMPLICATION OF HIM UNREFUTED OR SUBJECTING CODEFENDANT TO THE DANGERS OF CROSS-EXAMINATION PREJUDICED APPELLANT

Appellant suffered additional prejudice in being tried with a man who chose to take the stand in his own defense. In DeLuna v. U.S, 308 F.2d 140 (5th Cir. 1962), one defendant's primary defense consisted of laying the blame on the other. Counsel commented on co-defendants failure to testify. The court held that while it was proper for the attorney to draw all inferences possible in favor of his client, he could not do so at the expense of codefendant. The conflicting interests could be resolved only by separate trials.

In the instant case, if appelland had chosen to cross-examine codefendant that examination could well have damaged codefendant's case. He chose not to cross-examine and thus left codefendant's implication of him unrefuted. The prejudice caused by this DeLuna-like dilemma could be erased only by severance.

C. APPELLANT WAS PREJUDICED BY BEING TIED TO A SELF-DEFEATING THEORY OF DEFENSE

Appellant was further prejudiced by being tied to what the trial judge had termed a self-defeating theory of defense. Co-defendant testified to riot-like conditions at the time of arrest. He admitted entering Sure-Fit under these circumstances and stated that appellant had accompanied him. The judge had warned counsel that this would constitute a confession of guilt.

Although codefendant's statement was given in open court and thus rightfully in evidence against appellant, the jury should not have been encouraged to give it the same weight as an admission by appellant himself. Counsel for appellant may have unwittingly given just such encouragement. In urging the jury that appellant's silence should not be construed against him, counsel stated that the defendants' interests were the same and that the jury should draw no difference between the men. (Tr. 136). He thus seemed to adopt codefendant's defense, the same defense which has prompted him to request a severance earlier. This could not have happened

had the men been tried separately. Under Rule 14 severance should have been granted.

The time and expense of separate trials is a small price to pay in order to ensure that each individual may fully defend his own case in his own way. Appellant should be granted a new and separate trial.

CONCLUSION

For the above reasons, appellant submits that the conviction of the court below should be vacated and that a new and separate trial should be ordered.

Respectfully submitted

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